

**IN THE
SUPREME COURT OF MISSOURI**

No. SC92446

**BASF CORPORATION, INC,
Appellant,**

v.

**DIRECTOR OF REVENUE,
Respondent.**

**On Petition for Review from the
Missouri Administrative Hearing Commission**

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This appeal involves the questions of whether: (1) the materials Appellant recovers from its waste stream are “recovered materials,” (2) Appellant’s plant is a “material recovery processing plant,” and (3) the chemicals, electricity, coal and natural gas used to operate the machinery and equipment in the plant were exempt from use tax under Sections 260.200(28), 144.030.2(4) and 144.030.2(12) of the Revised Statutes of Missouri, which are revenue laws of the State of Missouri. Hence, this appeal involves the construction of revenue laws of this state, and this Court has jurisdiction under Article V, Section 3 of the Missouri Constitution.

POINTS RELIED ON

- I. The Administrative Hearing Commission erred in concluding that Appellant's Hannibal Plant is not a "material recovery processing plant," because the chemicals used in and recaptured by the Hannibal Plant are "recovered materials," in that Missouri law does not exclude liquids from the definition of "recovered materials."

RSMo § 144.030.2(4)

RSMo § 260.200(28)

12 C.S.R. § 10-111.060.2

- II. The Administrative Hearing Commission erred in concluding that the chemicals which Appellant claimed for exemption are not exempt, because the chemicals are required for and used solely in the operation of exempt machinery and equipment, in that the parties' joint stipulation in the record established these undisputed facts.

RSMo § 144.030.2(4)

12 C.S.R. § 10-111.060(4)(B)

- III. The Administrative Hearing Commission erred in concluding that the electricity which Appellant purchased and consumed was not exempt because the Hannibal Plant does process "recovered materials" and the raw materials used at the Hannibal Plant contain at least 25% "recovered materials," in that the parties' joint

stipulation and exhibits thereto in the record established the 25% threshold percentage and that the chemicals are “recovered materials” under Missouri law.

RSMo § 144.030.2(12)

RSMo § 144.030.2(4)

12 C.S.R. § 10-111.060

- IV. The Administrative Hearing Commission erred in concluding that the coal and natural gas which Appellant claimed for exemption were not exempt supplies, because the supplies were required for and used solely in the operation of exempt machinery and equipment, in that the parties’ joint stipulation and exhibits in the record established there was no other claimed use and the Department of Revenue did not argue that any other use was made of the coal and natural gas supplies.

RSMo § 144.030.2(4)

- V. The Administrative Hearing Commission erred in failing to apply its decision on a prospective only basis, because decisions which are not reasonably foreseeable or reflect new policy are to be applied prospectively only under RSMo §§ 32.053 and 143.903, in that the decision was not reasonably foreseeable because it contradicts the Director’s governing Regulation and the Director’s policy as stated in published Letter Rulings.

RSMo § 143.903

RSMo § 32.053

Greenbriar Hills Country Club v. Director of Revenue, 47 S.W.3d 346, 356-57
(Mo. banc 2001).

I. NATURE OF THE CASE

This is an appeal from a February 22, 2012 decision of the Administrative Hearing Commission (“AHC”) (L.F. 00271-00317).¹ The AHC’s decision upheld an assessment of use tax in the amount of \$359,526, based on BASF’s purchases of chemicals used at BASF Corporation, Inc.’s (“BASF’s”) plant in Hannibal, Missouri (“Hannibal Plant”) from July 1, 2000 through December 31, 2001. The AHC also denied BASF’s claim for a refund of use tax paid to the Director of Revenue for purchases of natural gas, coal, and electricity consumed at the Hannibal Plant during parts of audit years 1999 through 2005.²

BASF manufactures herbicides and pesticides at the Hannibal Plant through a series of chemical reactions. These reactions generate a stream of waste materials. Rather than dispose the waste materials into the environment, BASF recovers nearly all of the materials from the waste stream, processes them into their original state, and reuses the converted materials in subsequent production cycles. Based on these undisputed facts, BASF asserts that (i) the Hannibal Plant is a “material recovery processing plant,” and (ii) the chemicals, electricity, coal, and natural gas used to operate the machinery and

¹ “L.F.” refers to the Legal File and “A-__” refers to Appellant’s Appendix.

² BASF filed a complaint that challenged the Director’s use tax assessment on March 19, 2008. BASF filed a separate complaint for refund on June 27, 2008. The assessment and refund claims were consolidated on September 4, 2008. (L.F. 00153).

equipment in the Plant were exempt from use tax under RSMo §§ 144.030.2(4) and 144.030.2(12).

The AHC rejected BASF's claims on the principal ground that the Hannibal Plant does not qualify as a material recovery processing plant. The AHC based this determination on its finding that the Hannibal Plant does not process "recovered materials," as defined by Missouri law. The AHC ruled as a threshold legal matter that recovered materials must consist of "solid waste." Because BASF recovers liquid waste at the Hannibal Plant, the AHC denied BASF's claims in their entirety and as a matter of law. (L.F. 00304).

These case-dispositive legal rulings were wrong as a matter of law and should be reversed. Missouri law plainly recognizes that "recovered materials" include liquid waste. Furthermore, Missouri law does not provide that recovered materials must be solid waste, but rather that solid waste cannot be a "recovered material" – the opposite of what the AHC determined as a matter of law. The AHC's denial of BASF's challenge to the Director of Revenue's assessment of use tax based on purchases of chemicals at the Hannibal Plant in 2000 and 2001 should be vacated. The case should be remanded to the AHC for the sole purpose of calculating the refund due to BASF based on BASF's erroneous payment of use tax for electricity, coal, and natural gas from 1999 through 2005.

II. STATUTORY AND REGULATORY FRAMEWORK

BASF asserts that the Hannibal Plant qualifies as a material recovery processing plant under Missouri law in place during the assessment and refund period and, on that basis, claims use tax exemptions for its purchases of chemicals, coal, natural gas, and electricity used at the Plant. BASF claims that the chemicals, coal, and natural gas are exempt as “supplies” pursuant to RSMo § 144.030.2(4). (A-50-51). BASF further claims that its purchases of electricity at the Hannibal Plant are exempt under RSMo § 144.030.2(12). (A-51). At all relevant times, Chapter 144 provided:

§ 144.030. Exemptions from state and local sales and use taxes

(4) [M]achinery and equipment, and the materials and supplies required solely for the operation, installation or construction of such machinery and equipment, purchased and used to establish new, or to expand existing, material recovery processing plants in this state. For purposes of this subdivision, a “material recovery processing plant” means a facility which converts recovered materials into a new product, or a different form which is used in producing a new product, and shall include a facility or equipment which is used exclusively for the collection of recovered materials for delivery to a material recovery processing plant but shall not include motor vehicles used on highways.

(12) Electrical energy used in ... a material recovery processing plant as defined in subdivision (4) of this subsection, in facilities owned or leased by the taxpayer, if the total cost of electrical energy so used exceeds ten percent of the total cost of production, either primary or secondary, exclusive of the cost of electrical energy so used or if the raw materials used in such processing contain at least twenty-five percent recovered materials as defined in section 260.200....³

(A-50-51).

³ In 2005, the General Assembly modified § 144.030.2(4) on a prospective basis. SB196 (Laws, 2005) narrowed the application of the material recovery processing plant exemption to facilities that have “as [their] primary purpose the recovery of materials ...” SB196 further stated that “material recovery is not the reuse of materials within a manufacturing process or the use of a previously recovered product.” References in this brief are to RSMo § 144.030.2 as it existed before it was amended by SB196. Section 260.200 has also amended and renumbered, and the references herein are to the version that was in force during the relevant period.

12 C.S.R. 10-111.060.2 defined “material recovery processing plant and “recovered materials” as follows:

Definition of Terms

(A) Material recovery processing plant--A facility which converts recovered materials into a new product, or to a different form which is used in producing a new product, and includes facilities or equipment used exclusively for the collection of recovered materials for delivery to a material recovery processing plant but does not include motor vehicles used on highways.

(B) Recovered materials--Those materials that have been diverted or removed from the solid waste stream for sale, use, reuse or recycling, whether or not they require subsequent separation and processing.

(A-63).

RSMo § 260.200 defined “recovered materials” and “solid waste” as:

§ 260.200. Definitions

(28) "Recovered materials," those materials which have been diverted or removed from the solid waste stream for sale, use, reuse or recycling, whether or not they require subsequent separation and processing;

(34) "Solid waste," garbage, refuse and other discarded materials including, but not limited to, solid and semisolid waste materials resulting from industrial, commercial, agricultural, governmental and domestic activities, but does not include hazardous waste as defined in sections 260.360 to 260.432, recovered materials, overburden, rock, tailings, matte, slag or other waste material resulting from mining, milling or smelting; (A-57-58).

III. STATEMENT OF FACTS

The parties submitted the pertinent facts to the AHC on a lengthy and stipulated factual record. (L.F. 00162-269). Set out below are the uncontested facts that gave rise to BASF's claims.

A. Material Recovery and Processing at the Hannibal Plant

BASF manufactures pesticides and herbicides at the Hannibal Plant through three chemical processes, "Process A," "Process C," and "Process D." (L.F. 00276). The chains of chemical reactions that constitute Processes A, C, and D are complex, but the relevant aspects of each Process are straightforward and largely identical.

Processes A, C, and D create chemical products called "finished molecules." The finished molecules become the active ingredients in BASF's herbicides and

pesticides. (L.F. 00272-00273).⁴ Some of the intermediate chemical compounds in Processes A, C, and D do not become part of the finished molecules and instead are eliminated as a waste stream. BASF recovers waste materials generated in Processes A, C, and D and processes them into reusable form. During the recovery and conversion process, BASF eliminates water and other impurities from the waste stream, mixes the recovered material with “virgin chemical,” and then introduces the reclaimed chemicals into subsequent production cycles. (L.F. 00280-00282; 00287-00290; 00291-00293). The materials that BASF recovers and processes are liquids, but the waste stream from which they are removed contains both solid and liquid materials at various points in the recovery process. (L.F. 00276-00277).

Processes A, C, and D occur in chemical reactors at the Hannibal Plant, which contain and enhance the desired chemical reactions by applying, heat, pressure, and physical agitation to the reacting chemicals (or “reactants”). (L.F. 00277). Nearly all of the steps in these Processes are automated. Chemicals are introduced at various stages in the Processes and flow from one reactor to another through a series of pipes. (L.F. 00277-00278). Because chemical reactions occur most thoroughly and efficiently when the reactants are in a liquid rather than a solid state, BASF also employed solvents to

⁴ The AHC considered a fourth process, “Process B.” Process B is not at issue in this appeal. To protect BASF’s trade secrets and other proprietary information, the parties submitted redacted and unredacted stipulations of facts. Citations above are to the redacted stipulation.

dissolve various reactants into liquids. (L.F. 00276-00277). The primary solvent used in the Hannibal Plant is sulfuric acid, most of which is recovered, processed, and reused. (L.F. 00281, 00292).

Each chemical and solvent at issue in this case is a necessary element of Processes A, C, and/or D. As the AHC found, without these chemicals and solvents, the machinery and equipment used in Processes A, C, and D “would not achieve the desired chemical reactions ... and would not create the desired finished molecules.” (L.F. 00278-00280; 00283-287; 00290-00291). The parties further stipulated that the chemicals, solvents, gases, and catalysts that BASF uses in Processes A, C, and D are required “solely” for the operation of the machinery and equipment that produces finished molecules and recovers waste materials at the Hannibal Plant. (L.F. 00171, 00175, 00177, 00182).

BASF challenged the Director’s assessment of use tax relating to BASF’s purchases of chemicals required to drive Processes A, C, and D. BASF argued that the chemicals were supplies required to operate the machinery and equipment at the Hannibal Plant and, therefore, exempt from use tax pursuant to RSMo § 144.030.2(4). The AHC found that the chemicals were indeed “supplies” under § 144.030.2(4) (L.F. 00305), but denied the claimed exemption on the purported grounds that the Hannibal Plant was not a material recovery processing plant. The AHC based this determination on its finding that the Hannibal Plant does not process “recovered materials,” as that term is defined under Missouri law. (L.F. 00304). As explained at Point V(A) of this brief, the AHC’s finding

that the Hannibal plant does not process recovered materials is wrong as a matter of law and should be reversed.

B. Electricity Purchased to Operate Machinery and Equipment at the Hannibal Plant.

BASF uses electricity to power the machinery and equipment that produces finished molecules and recovers waste materials at the Hannibal Plant. Machinery powered by electricity includes pumps used to propel waste streams and recover reusable materials from the waste streams, motors used to agitate ingredients in chemical reactors, and well pumps used to provide water for the production processes at the Hannibal Plant. (L.F. 00296-00297).

BASF claimed an exemption for electricity under RSMo § 144.030.2(12), which exempts purchases of electricity used in a material recovery processing plant if the raw materials used in processing contain at least twenty-five percent “recovered materials.” The stipulated evidence established that the raw materials processed at the Hannibal plant were comprised of more than twenty-five percent recovered materials. (L.F. 00192-00196). Nevertheless, the AHC ruled as a matter of law that electricity used at the Hannibal Plant was not exempt under § 144.030.2(12), based on its earlier legal ruling that the Plant does not process “solid waste.” (L.F. 0000317). As explained at Point V(A), the AHC’s predicate legal finding – that the Hannibal Plant is not a material recovery processing plant because it processes liquid waste – is incorrect and must be reversed. Since the AHC’s denial of the exemption claimed for electricity depends on its

erroneous ruling that the Hannibal Plant did not process recovered materials, the AHC's rejection of BASF's electricity claim must also be reversed.

C. Coal and Gas Burned to Heat and Pressurize Material Recovery and Processing Equipment.

BASF combusts natural gas and coal to provide the heat and pressure necessary to sustain the chemical reactions in Processes A, C, and D. BASF burns natural gas in a furnace, which allows it to convert recovered sulfuric acid, the primary solvent used at the Hannibal Plant, into a useable form. (L.F. 00294). BASF also burns coal in boilers to create steam. The steam provides heat and pressure to the chemical reactors and other machinery and equipment used to carry out Processes A, C, and D. (L.F. 00295-00296). The AHC found that the reactions that constitute Processes A, C, and D could not be achieved without the heat and pressure provided by this steam. (L.F. 00296).

BASF claimed that coal and natural gas used to operate machinery at the Hannibal Plant were exempt from use tax as supplies under RSMo § 144.030.2(4). The AHC accepted BASF's argument that coal and natural gas qualify as "supplies" under § 144.030.2(4), but rejected the claimed exemption because it found that BASF failed to adequately demonstrate that its purchases of coal and gas were required "solely for the operation of machinery and equipment used to establish new, replace old, or expand an existing material recovery processing plant." (L.F. 00313-00315). As stated *infra* at Point V(D), this conclusion is not borne out by the record; the undisputed evidence is that the coal and gas for which BASF claims an exemption were required to operate

qualifying machinery. Nor did the Director dispute at trial the manner in which BASF used coal and gas at the Hannibal Plant. As explained at Point V(D), to the extent this Court finds any ambiguity in the record regarding BASF's use of coal and natural gas, this issue should be remanded to the AHC to calculate the amount and value of coal and gas used to operate exempt equipment at the Hannibal Plant.

IV. SUMMARY OF ARGUMENT

The Hannibal Plant qualifies as a "material recovery processing plant" because it recovers materials from a solid waste stream and converts them into a new product. The AHC equated "recovered materials" with "solid waste," and denied all of BASF's claims on the grounds that BASF processes liquid (rather than solid) materials at the Hannibal Plant. This case-dispositive ruling was wrong as a matter of law and should be reversed. The material recovery processing plant exemption does not require recovered materials to consist of solid waste. As explained *infra*, the AHC's ruling to the contrary ignores the plain language of RSMo § 260.200 and effectively reads the material recovery processing plant exemption out of existence. Moreover, the Director of Revenue's governing Regulation, 12 C.S.R. 10-111.060.4(B), and letter rulings consistently recognize that liquid materials qualify as recovered materials for purposes of the material recovery processing plant exemption.

The AHC further erred by ruling as a matter of law that BASF failed to show that the chemicals used at the Hannibal Plant were required and used solely to operate exempt machinery and equipment. The AHC improperly disregarded the parties' factual

stipulation on this point. Both parties relied upon their stipulation that BASF purchased chemicals that were required solely to achieve the desired chemical reactions within machinery and equipment at the Hannibal plant. No evidence inconsistent with the stipulation was presented. The record does not support the AHC's speculation that the chemicals were purchased for any purpose other than operating the reactors that drive Processes A, C, and D, or that the reactors in the Hannibal Plant could be used for their intended purpose without these chemicals. The AHC's denial of BASF's exemption for electricity purchased and consumed at the Hannibal Plant is incorrect and should be reversed. The AHC rejected the electricity exemption on the stated grounds that BASF does not process "recovered materials" at the Hannibal Plant. The AHC's rejection of the electricity exemption rests entirely on its assumption that "recovered materials" must consist of "solid waste," as defined by § 260.200. This predicate assumption is wrong: Under Missouri law, liquid materials such as those processed at the Hannibal Plant plainly qualify as recovered materials. Because BASF processes recovered materials at the Hannibal Plant, the electricity exemption should be allowed.

BASF's claimed exemptions for coal and natural gas burned at the Hannibal Plant should also be allowed. At trial, the parties only disputed whether the coal and gas qualified as "supplies" used to operate machinery at a material recovery processing plant – and AHC prevailed on this point. Nevertheless, the AHC denied the exemptions on the purported ground that BASF did not establish that coal and gas at the Hannibal Plant are "required solely for the operation" of exempt machinery and equipment. The record evidence was to the contrary. BASF clearly demonstrated that coal at the Hannibal Plant

was burned to heat and pressurize the chemical reactors in which Processes A, C, and D. The evidence similarly established that the Hannibal Plant burns natural gas to facilitate the recovery of sulfuric acid, the primary solvent used at the Hannibal Plant. The AHC's finding that BASF failed to show that its coal and gas were used solely to operate exempt machinery at the Hannibal Plant should be reversed, or, alternatively, remanded for clarification on this narrow question of fact.

Finally, if the AHC's decision is not reversed, it should be applied only on a prospective basis, and not with respect to the exemptions at issue here. The foundation for the decision is its finding that "recovered materials" must consist of "solid waste" and may not include liquid materials. This finding is not grounded in the text of any Missouri statute, and it contradicts the Director of Revenue's Regulations and Letter Rulings. By excluding liquid materials from the universe of recovered materials, the AHC in effect negated the material recovery processing plant exemption provided by RSMo §§ 144.030.2(4) and 144.030.2(12), along with the Director of Revenue's own interpretations of the exemption. BASF could not reasonably have foreseen such a result. Affirmance of the AHC's decision likewise would be an unforeseeable result. Accordingly, if the AHC's decision is not reversed, it should be applied only on a prospective basis, and the exemptions claimed here should be allowed.

V. ARGUMENT

- A. The Administrative Hearing Commission erred in concluding that BASF's Hannibal Plant is not a "material recovery processing plant," because the chemicals used in and recaptured by the Hannibal Plant are "recovered materials," in that Missouri law does not exclude liquids from the definition of "recovered materials."**

1. Standard of review:

While BASF bore the burden of proof before the AHC to show that it qualifies for the exemptions it claims, the question of whether the Hannibal Plant is a "material recovery processing plant" is a question of law, subject to de novo review. *See Branson Properties USA, L.P. v. Director of Revenue*, 110 S.W.3d 824, 825 (Mo. banc 2003).

- 2. The Hannibal Plant qualifies as a material recovery processing plant because it recovers materials from a solid waste stream and converts them into a new product.**

RSMo § 144.030.2(4) defines a material recovery processing plant as "a facility which converts recovered materials into a new product, or a different form which is used in producing a new product." (A-51). The Director of Revenue's applicable regulation during the relevant time period, 12 C.S.R. 10-111.060.2(A), defined the term "material recovery processing plant" with identical language. (A-63). RSMo § 144.030.2(4) did not specify what qualifies as a "recovered material" for purposes of the material recovery

processing plant exemption, but the definition is not in dispute for purposes of this case. (A-50-55). RSMo §260.200(28) defined “recovered materials” as “those materials which have been diverted or removed from the solid waste stream for sale, use, reuse or recycling, whether or not they require subsequent separation and processing[.]” (A-57). The Director of Revenue’s Regulation, 12 C.S.R. 10-111.060.2(B), used the same definition for recovered materials. (A-63).

The Director of Revenue has consistently recognized that RSMo § 260.200(28)’s reference to a solid waste “stream” necessarily means that “recovered materials” include both liquid and solid materials. A “stream” is commonly defined as a “body of running water” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED, MERRIAM WEBSTER 2258 (1986). Thus, a “solid waste stream” logically may contain both solid and liquid materials – just as “potato soup” contains both potatoes and the liquids required to make the dish a soup. The example of a material recovery processing plant in 12 C.S.R. 10-111.060.4(B) stated this point emphatically:

Examples:

(B) A taxpayer recycles fuel. It processes both solid and liquid waste materials for use as a fuel in its cement manufacturing operation. . . .

The taxpayer’s mobile and conveyor systems are used to transport the solid and liquid wastes to different processes performed on the materials in taxpayer’s facility. The fuel recycling facility would qualify as a material recovery processing plant because it converts

recovered materials, solid and liquid waste materials, into a new product, fuels, that are then used to manufacture a new product, cement. (Emphasis added).

(A-63).

The Director's previous Letter Rulings take a similarly expansive view of items that qualify as "recovered materials." *See, e.g.*, Letter Ruling L8886, Missouri Department of Revenue, May 17, 1996 (plant that recovered and processed "liquid waste materials, including various solvents, paints, organic chemicals, dry cleaning fluids and oils" held to be a material recovery processing plant) (A-65-66); Letter Ruling 2207, Missouri Department of Revenue, March 29, 2000 (emphasizing that the term "recovered materials ... must be given a "common sense and practical interpretation.") (A-67-68).⁵

Applying these rules together, the Hannibal Plant is a material recovery plant if it removes liquid and/or solid materials from a waste stream and reuses or converts those materials into a new product. This is exactly what the Hannibal Plant does. In

⁵ While private or letter rulings issued by Respondent are not binding on the Department and cannot be relied on by other persons or parties, nevertheless these rulings can be cited to show the position of Respondent on issues before the Court and to determine if Respondent has changed its position. *See Lincoln Industrial, Inc. v. Director of Revenue*, Case No. 99-1058 RV (Mo. A.H.C. 2000), *rev'd on other grounds* 51 S.W.3d 462 (Mo. banc 2001).

manufacturing Processes A, C, and D, BASF recovers solvents and other chemicals from a waste stream that contains liquid and solid materials. These items are plainly “recovered materials” under Missouri law. BASF processes these recovered materials to put them in a reusable form, and then puts them to use in subsequent production cycles. Missouri law requires nothing more to establish the Hannibal Plant as a “material recovery processing plant. Letter Ruling L8886, Missouri Department of Revenue, May 17, 1996 (“Applicant's facility meets the conditions of the exemption statute because it converts solid and liquid waste materials into fuels that are then used in the manufacture of cement, a new product.”)

3. The AHC incorrectly ruled that the Hannibal Plant is not a material recovery processing plant by equating “recovered materials” with solid waste.

Interpreting RSMo § 260.200(28), the AHC determined that recovered materials must qualify as “solid waste.” Because the Hannibal Plant recovers and converts liquid materials rather than “solid waste,” the AHC further ruled as a matter of law that the Plant does not qualify as a material recovery processing plant. (L.F. 00304) (“The chemicals BASF reclaims are not recovered materials because they are not solid waste and are not diverted from the solid waste stream. The Hannibal Plant is not a material recovery processing plant.”). These rulings defy the language of the statutes and regulations on which the AHC relied and should be reversed.

RSMo § 260.200(28) defined “recovered materials” as “those materials which have been diverted or removed from the solid waste stream for sale, use, reuse or recycling, whether or not they require subsequent separation and processing.” (A-57). While recovered materials must be diverted or removed from a “solid waste stream,” nothing in this definition states or implies that recovered materials themselves must consist of “solid waste.” Furthermore, RSMo § 260.200(34) provides in the same breath that “solid waste” “does not include ... recovered materials.” (A-58). Thus, § 144.030’s reference to § 260.200 does not and cannot mean that the recovered materials must qualify as “solid waste,” as that term is defined in RSMo § 260.200. Indeed, by the AHC’s reading, “recovered materials”– solid or otherwise – cannot qualify for the exemption because any such recovered material is as a matter of law not “solid waste.” Equating “recovered materials” with “solid waste” effectively reads § 144.030’s exemptions out of existence. Fundamental rules of statutory construction do not allow such a strained result. *Elrod v. Treasurer of Missouri*, 138 S.W.3d 714, 716 (Mo. banc. 2004) (“This Court ‘uses rules of statutory construction that subserve rather than subvert legislative intent.... [W]e will not construe the statute so as to work unreasonable, oppressive, or absurd results.’”) (citation omitted).

As explained above, the Director of Revenue’s own applicable Regulation and Letter Rulings, which the AHC ignored, expressly recognize that recovered materials

may include liquid materials.⁶ Recognizing that recovered materials may include liquid materials allows RSMo §§ 144.030.2(4) and 260.200 to be read consistently and preserves the material recovery processing plant exemption that the General Assembly clearly intended to provide. This approach accords with basic principles of statutory construction and should be applied here. *Daley v. State Tax Comm’n*, 120 S.W.3d 262, (Mo. App. E.D. 2003) (“[W]e will not construe a statute or regulation to produce unreasonable, oppressive, or absurd results.... We will give the words in a statute or regulation their plain or ordinary meaning ... and will harmonize all of the provisions if reasonably possible.”)

B. The Administrative Hearing Commission erred in concluding that the chemicals which Appellant claimed for exemption are not exempt, because the chemicals are required for and used solely in the operation of exempt machinery and equipment, in that the parties’ joint stipulation in the record established these undisputed facts.

Standard of review:

In tax matters, this Court reviews factual findings of the AHC “to determine primarily whether competent and substantial evidence upon the whole record supports the decision” *Mackey v. Director of Revenue*, 200 S.W.3d 521, 523 (Mo. banc 2006)

⁶ RSMo § 144.030.2 recognized that even “gases” may qualify as a “material.” (A-50).

Gaseous materials are further from “solids” than liquids. If a gas qualifies as a material, there is no plausible basis for denying that a liquid does as well.

(citation omitted). Substantial evidence is “evidence from which the trier of fact reasonably could find the issues in harmony therewith.” *Holm v. Director of Revenue*, 148 S.W.3d 313, 314 (Mo. banc 2004).

* * *

BASF claimed that the chemicals used at the Hannibal Plant were exempt under RSMo § 144.030.2(4) as supplies used to operate exempt machinery and equipment at a material recovery processing plant.⁷ The AHC agreed that the chemicals used at the material recovery processing plant qualify as supplies under § 144.030.2(4). (L.F. 00305-00306). Accepting for purposes of argument BASF’s claim the Hannibal Plant qualifies as a material recovery processing plant, the AHC denied the exemption based on its findings that the chemicals were not “required solely” for operating exempt equipment and that the chemicals may have been used for purposes other than operating exempt equipment. (L.F. 00307-00308). These rulings ignore the undisputed record evidence and should be reversed.

The parties stipulated in detail the specific equipment in which the chemicals at issue were used – chemical reactors at the Hannibal Plant. (L.F. 00183-184). The parties

⁷ Under the material recovery processing plant exemption, exempt equipment includes “machinery and equipment ... purchased and used to establish new, or to replace or expand existing, material recovery processing plants in this state.” RSMo § 144.030.2(4). (A-51).

further stipulated that the chemicals used at the Hannibal Plant “are required solely to achieve the desired chemical reactions within [the] machinery and equipment” that drive Processes A, C, and D. (L.F. 00171, 00175, 00177, 00182). But the AHC rejected this stipulation out of hand and speculated that the chemicals at the Plant may not have been required to operate the exempt machinery and equipment at the Hannibal Plant. (L.F. 00308). The AHC further speculated that the chemicals may have been used to operate machinery and equipment that was not exempt, opining that “[s]ome may have been and some may not have been.” (L.F. 00310).

How the machinery and equipment at the Hannibal Plant could have been used for their intended purpose without the chemicals purchased for Processes A, C, and D, the AHC’s decision does not say. Nor does the decision state any basis for the conclusion that some of the chemicals “may not” have been used to operate exempt equipment. Nor does the decision suggest why BASF would have purchased the chemicals for any reason other than carrying out the reactions that comprise Processes A, C, and D in the machinery and equipment at the Hannibal Plant. The AHC’s speculation on these matters is not tethered to any facts in the record and should be rejected. The parties’ stipulation that the chemicals are “required solely” for operating machinery and equipment at the Hannibal Plant “to achieve the desired chemical reactions within that equipment” answered basic questions of fact – how, why, where, and to what extent does BASF use specific chemicals at the Plant. No evidence contrary to the stipulation was

submitted or argued. BASF was entitled to rely on this factual stipulation, and the AHC's contrary ruling should be reversed.

The AHC appears to have disregarded the parties stipulation as a stipulation as to a legal conclusion, which, of course, would not be binding. (L.F. 00305). However, the stipulation that the chemicals at issue "are required solely for the operation of the machinery and equipment to achieve the desired chemical reactions within that machinery and equipment" is hardly a stipulation of law. It is a plain English stipulation to the effect that the chemicals at issue are necessary for specific reactions to be completed. There are only so many words that can be used to express that concept, and the overlap of certain words between the stipulation and the statute does not transform a stipulation of fact into a stipulation of law.

"Ordinarily courts are bound by stipulations of litigants." *Midella Enterprises, Inc. v. Missouri State Highway Commission*, 570 S.W.2d 298, 301 (Mo. App. Springfield 1978). Both parties relied upon the stipulation, and did not brief or argue facts recited therein. Therefore, if there is any factual ambiguity about whether the chemicals were required to achieve the desired reactions, the case should be remanded for a more specific factual determination on this question.

C. The Administrative Hearing Commission erred in concluding that the electricity which Appellant purchased and consumed was not exempt because the Hannibal Plant does process "recovered materials" and the raw materials used at the Hannibal Plant contain at least 25%

“recovered materials,” in that the parties’ joint stipulation and exhibits thereto in the record established the 25% threshold percentage and that the chemicals are “recovered materials” under Missouri law.

Standard of review:

The question of whether the electricity at issue was exempt is a mixed question of law and fact. “[W]hen presented with an issue of mixed questions of law and fact, a [reviewing court] will defer to the factual findings made by the trial court so long as they are supported by competent, substantial evidence, but will review de novo the application of the law to those facts.” *Pearson v. Koster*, Nos. SC 92317, SC 92326, 2012 WL 1926035 at *4 (Mo. banc May 25, 2012) (Rehearing Denied July 3, 2012) (citation omitted) (alteration in original).

* * *

BASF requested an exemption for electricity purchased at the Hannibal plant under RSMo § 144.030.2(12). Section 144.030.2(12) provides an exemption for electricity used at a material recovery processing plant if “the raw materials used in such processing contain at least twenty-five percent recovered materials as defined in section 260.200, RSMo.” (A-51).

The stipulated exhibits clearly establish that the raw materials processed at the Hannibal plant constitute “at least twenty-five percent recovered materials.” (L.F. 00192-196). The AHC rejected BASF’s electricity exemption based on its earlier ruling that

nearly all the chemicals BASF processes are not “recovered materials” as defined by RSMo § 260.200. However, the AHC’s rejection of the electricity exemption rests entirely on its legal conclusion that “recovered materials” must consist of “solid waste,” as defined by § 260.200. As stated *supra* at Point V(A), the materials at issue in this case are indeed “recovered materials” as a matter of Missouri law. Since those materials clearly constitute more than twenty-five percent of the raw materials processed at the Hannibal plant, the electricity used at the plant during the relevant time period is exempt as a matter of law.

D. The Administrative Hearing Commission erred in concluding that the coal and natural gas which Appellant claimed for exemption were not exempt supplies, because the supplies were required for and used solely in the operation of exempt machinery and equipment, in that the parties’ joint stipulation and exhibits in the record established there was no other claimed use and the Department of Revenue did not argue that any other use was made of the coal and natural gas supplies.

Standard of review:

The question of whether the coal and natural gas that Appellant claimed for exemption are exempt supplies is a mixed question of law and fact. “[W]hen presented with an issue of mixed questions of law and fact, a [reviewing court] will defer to the factual findings made by the trial court so long as they are supported by competent,

substantial evidence, but will review de novo the application of the law to those facts.”
Pearson, 2012 WL 1926035 at *4.

* * *

BASF argued that its purchases of coal and natural gas were exempt pursuant to RSMo § 144.030.2(4) as supplies required and used to operate exempt machinery at a material recovery processing plant. The AHC accepted BASF’s argument that coal and gas are supplies for purposes of § 144.030.2(4), but denied the exemption on the purported ground that BASF did not adequately establish that the coal and gas are “required solely for the operation” of exempt machinery and equipment. (L.F. 00313-00316). The parties, however, did not dispute whether the coal and gas were used to operate exempt equipment. Rather, the only contested issue was whether the coal and gas were, in fact, supplies – and BASF prevailed on this sole issue of disputed fact.

The undisputed record evidence demonstrated that BASF used coal to generate the steam that heats and pressurizes the chemical reactors in which Processes A, C, and D are carried out. The stipulated evidence likewise established that these Processes would not occur but for the heat and pressure supplied through the coal burned at the Hannibal Plant. Similarly, the Hannibal Plant burned natural gas to carry out its recovery and processing of sulfuric acid, the primary solvent used at the Plant. The record does not support any inference that the coal or natural gas burned at the Hannibal Plant was required or used for any other purposes. Accordingly, the coal and gas qualify as exempt supplies under RSMo § 144.030.2(4). If the Court accepts the AHC’s sua sponte

determination that BASF did not show with sufficient precision what percentage of the gas and coal were used to operate exempt equipment, this narrow issue which the Director of Revenue has never disputed should be remanded for a final factual determination.

E. The Administrative Hearing Commission erred in failing to apply its decision on a prospective only basis, because decisions which are not reasonably foreseeable or reflect new policy are to be applied prospectively only under RSMo §§ 32.053 and 143.903, in that the decision was not reasonably foreseeable because it contradicts the Director’s governing Regulation and the Director’s policy as stated in published Letter Rulings.

Standard of review:

Whether the AHC’s conclusion that “recovered materials” do not include liquids was unexpected and should only be applied prospectively is a question of law, and such questions are reviewed de novo. *See Branson Properties USA, L.P. v. Director of Revenue*, 110 S.W.3d 824, 825 (Mo. banc 2003).

* * *

The AHC’s decision stands or falls on its determination that “recovered materials” must consist of “solid waste” and may not include liquid materials. This determination is not rooted in the text of any Missouri statute. Nor is there any support for such a

proposition under the Director of Revenue's Regulations and Letter Rulings. To the contrary, the Director of Revenue's established policy before this case was that recovered materials include liquid materials for purposes of the material recovery processing plant exemption.

By excluding liquid materials from the universe of recovered materials, the AHC effectively nullified the material recovery processing plant exemption provided by RSMo §§ 144.030.2(4) and 144.030.2(12), along with the Director of Revenue's own interpretations of the exemption. BASF could not reasonably have foreseen such a result. Affirmance of the AHC's decision would be a likewise unforeseeable result. Accordingly, if the AHC's decision is not reversed, it should be applied only on a prospective basis. RSMo § 32.053 ("Any final decision of the department of revenue which is a result of a change in policy or interpretation by the department effecting a particular class of person subject to such decision shall only be applied prospectively.") (A-48); RSMo § 143.903 ("[A]n unexpected decision by or order of a court of competent jurisdiction or the administrative hearing commission shall only apply after the most recently ended tax period of the particular class of persons subject to such tax imposed by chapters 143 and 144, RSMo, and any credit, refund or additional assessment shall be only for periods after the most recently ended tax period of such persons.") (A-49); *see also Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 356-57 (Mo. banc 2001).

The case for prospective application is especially strong because prospective application will not have a substantial impact on the State's budget. RSMo § 144.030.2 was narrowed seven years ago to provide that only plants whose "primary purpose" is material recovery qualify for the material processing plant exemption. The limitations period for challenging assessment and asserting refund claims under the pre-2005 statute expired in 2008. *See* RSMo § 140.730.3 (providing a three-year period in which to challenge tax bills). The Director of Revenue is therefore unlikely to receive any new claims for exemption similar to those at issue in this case.

VI. CONCLUSION

BASF's Hannibal Plant is a material recovery processing plant as that term was defined by Missouri law and applied by the Director of Revenue during the assessment and refund period. Accordingly, the chemicals, electricity, coal, and natural gas required and used to operate the machinery at the Hannibal Plant are exempt from use tax. BASF respectfully requests that this Court vacate the AHC's denial of (i) BASF's challenge to the Director of Revenue's assessment of use tax relating to BASF's purchase of chemicals during 2000 and 2001 and (ii) BASF's claim for a refund of use tax paid to the Director of Revenue for purchases of natural gas, coal, and electricity from 1999 through 2005. BASF further requests that the Court remand the case to the AHC for the sole purpose of calculating the refund due to BASF based on BASF's erroneous payment of use tax for electricity, coal, and natural gas from 1999 through 2005.

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CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME
COURT RULE 84.06(B)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) in that according to the word count function of Microsoft Word by which it was prepared, contains 7,032 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was filed electronically this 1st day of August, 2012, causing a true and correct copy to be transmitted to:

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